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Before the
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of

Allocation of Spectrum Below 5 GHz
Transferred from Federal
Government Use

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ET Docket No. 94-32

COMMENTS OF COX ENTERPRISES, INC. AND COMCAST CORPORATION

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SUMMARY

Cox Enterprises, Inc. and Comcast Corporation urge the Commission to reject Local Exchange Carrier ("LEC") proposals advocating an exclusive LEC spectrum allocation be made for the development of a wireless local loop. The record does not support an exclusive allocation of spectrum for this purpose and grant of such a set-aside is flawed as a matter of public policy.

The LECs' comments suggest that the Government reallocated spectrum is the only spectrum available or suitable for developing a wireless local loop, and that additional spectrum is necessary to construct alternative wireless systems in areas where no infrastructure exists or where equipment and copper plant is aging. They totally ignore the licensed and unlicensed PCS allocations that are fully available for the delivery of wireless local loop service as well as other services. In particular, the 10 MHz allocations in the 2 GHz frequencies allocated for PCS use are available and, by Southwestern Bell's previous statements in the PCS rulemaking proceeding, are well suited for wireless loop technologies deployed by in-market LECs.

Moreover, setting aside spectrum for exclusive LEC use in the context of allocating new spectrum for advanced services will set back significantly the Commission's efforts to promote competition in the local loop. As repeatedly emphasized in the PCS rulemaking and related proceedings, the Commission is well aware of the potential of new spectrum allocations to encourage competition within all telecommunications markets, including the local exchange. Adopting a set-aside in the frequency bands at issue here will

provide LEC monopolies with exclusive control over additional valuable spectrum for a service they may already provide using PCS spectrum. It will also serve to further entrench the local exchange carrier as the favored and forever dominant provider of local services.

A LEC set-aside will only inhibit the development of competition in the local exchange marketplace. Should the Commission decide to establish a specific wireless local loop allocation, the Commission must confirm that LECs are not to be awarded any form of special treatment or accorded any enhanced eligibility status.

TABLE OF CONTENTS

	<u>Page</u>
I. Introduction	1
II. The Record Does Not Support an Exclusive Allocation of Spectrum To Local Exchange Carriers For The Development of a Wireless Local Loop	4
III. Commission Rules Encourage Use of PCS Spectrum For Wireless Local Loop	7
IV. The Public Interest Would Not be Served By a LEC Spectrum Set-Aside	9
V. Conclusion	12

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Cox Enterprises, Inc. ("Cox") and Comcast Corporation ("Comcast"), by their attorneys, hereby jointly submit reply comments in response to the Federal Communications Commission's (the "Commission" or "FCC") proposed reallocation of 50 MHz of Government spectrum for non-Government use. Initial comments were filed in this proceeding on December 19, 1994, pursuant to a Notice of Proposed Rulemaking released November 8, 1994.^{1/}

I. Introduction

The proposed 50 MHz of spectrum the Commission seeks to make available for private sector use was identified initially by the Department of Commerce pursuant to provisions of the Omnibus Budget Reconciliation Act of 1993 (the "Act"). The Act required the Secretary of Commerce to identify 200 MHz of spectrum, currently used by Federal Government agencies, for reallocation to private use to promote advanced technologies and to

^{1/} See Notice of Proposed Rulemaking, Allocation of Spectrum Below 5 GHz Transferred from Federal Government Use, ET Docket No. 94-32 FCC 94-272 (adopted October 20, 1994, released November 8, 1994) (hereafter "Notice").

provide for economic growth.^{2/} Of the 200 MHz of spectrum, at least 50 MHz was to be reallocated immediately, with the remaining spectrum to be made available over a ten year period.

The Department of Commerce released its Preliminary Report on February 10, 1994, identifying three frequency bands available for reallocation: 2390-2400 MHz, 2402-2417 MHz and 4660-4685 MHz. The Commission subsequently issued a Notice of Inquiry ("NOI") seeking information on potential commercial service applications for the spectrum. Seventy-seven comments and seventeen reply comments were filed.

Having received a wide variety of competing and mutually exclusive requests and proposals in response to its NOI, the Commission released the Notice to solicit specific comment on whether the spectrum at 2390-2400 MHz, 2402-2417 MHz and 4660-4685 MHz should be allocated for new or developing services, or for the reaccommodation of existing services. The Notice proposed that these frequencies be allocated for general Fixed and Mobile services, rather than specifying particular uses. In addition, the Commission expressed an intention to make licenses for this spectrum available as a general matter through competitive bidding.

The comments received in response to the Notice reflect equally varied proposals for the spectrum's use, including recommendations by a number of commenters that a significant portion of the spectrum be allocated for the development of a wireless local loop. In particular, Southwestern Bell ("SW Bell") recommended that the 2390-2400 MHz

^{2/} All of the 200 MHz of spectrum recommended for allocation was required to be located below the 5 GHz band, with at least 100 MHz of this to be located below the 3 GHz band.

spectrum band be paired with the 2300-2310 MHz spectrum band and that the spectrum be allocated exclusively for the deployment of wireless local loop technology by the LECs.^{3/} A number of LEC commenters have expressed agreement with SW Bell's proposal.^{4/}

As active participants in the development of new technologies and present and future telecommunications competitors, Cox and Comcast urge the Commission to reject the LEC wireless local loop allocation proposal. The record does not support an exclusive allocation of spectrum for the development of a wireless local loop and grant of such a set-aside is flawed as a matter of public policy. Should the Commission provide a specific allocation within these spectrum bands for the development of wireless local loops, the Commission must confirm that LECs are not to be awarded any form of special treatment or accorded any enhanced eligibility status.

3/ See Comments of SW Bell, filed December 19, 1994. SW Bell initially made this recommendation in its comments and reply comments in response to the NOI. See Comments of SW Bell filed June 15, 1994; Reply Comments of SW Bell filed June 30, 1994.

4/ See Comments of the United States Telephone Association ("USTA"), filed December 19, 1994; Comments of NYNEX Corporation, filed December 19, 1994; Comments of Bell Atlantic, filed December 19, 1994; Comments of Southwestern Bell, filed December 19, 1994; Comments of U S West, filed December 19, 1994; Comments of Rochester Telephone Corporation, filed December 19, 1994; Comments of TDS Telecommunications Corp., filed December 19, 1994; Comments of the Organization for the Protection and Advancement of Small Telephone Companies, filed December 19, 1994. Although not all of the aforementioned parties have explicitly advocated a LEC set-aside, their comments generally support Southwestern Bell's exclusive spectrum allocation proposal.

II. The Record Does Not Support an Exclusive Allocation of Spectrum To Local Exchange Carriers For The Development of a Wireless Local Loop.

In soliciting comment on proposed uses of the reallocated spectrum, the Commission specifically requested comment on the public benefits of alternative proposals. The Commission asked that parties provide a cost/benefit analysis for their recommendations and compare their proposal to competing recommendations.^{5/} In particular, the Commission asked that commenters identifying specific services for these bands discuss why the allocations are necessary and how the allocations would impact future flexibility as technology advances and new services become available.^{6/}

SW Bell, along with concurring parties, have failed to provide any support for an exclusive allocation of spectrum to the LECs for a wireless local loop. In fact, such an allocation cannot be justified in light of the availability of Personal Communications Services ("PCS") spectrum. SW Bell previously acknowledged that PCS spectrum offers sufficient capabilities for the development of wireless local loops. An exclusive set-aside of spectrum for the development of wireless local loops simply is not required to achieve the public benefits touted in the LEC comments advocating an exclusive spectrum allocation.

The LECs' comments suggest that the reallocated spectrum is the only spectrum available or suitable for developing a wireless local loop, and that additional spectrum is necessary to construct alternative wireless systems in areas where no

^{5/} See Notice at ¶ 23.

^{6/} Id.

infrastructure exists or where equipment and copper plant is aging.^{7/} They ignore, however, PCS allocations that consistently have been viewed as presenting opportunities for the delivery of wireless local loop service as well as services competing with cellular. The 10 MHz allocations in the 2 GHz frequencies allocated for PCS use are available and well suited for wireless loop technologies deployed by in-market LECs.^{8/}

The LECs are only limited in the amount of PCS spectrum they can hold in their monopoly landline regions in the same manner as all other potential licensees.^{9/} Even LECs with in-market cellular affiliates are eligible to bid on a 10 MHz spectrum block to provide wireless local loop services. The LECs, therefore, already have more than an adequate amount of spectrum at their disposal to accomplish the goals they claim might be derived by a wireless local loop allocation.

The Commission has recognized repeatedly in the PCS proceedings that PCS spectrum offers licensees the ability to construct a wireless loop. Comcast and Cox, among others, have always viewed PCS technologies as providing the potential, subject to strong

7/ See, e.g., Comments of Southwestern Bell at 3-4; Comments of U S West at 8-9; Comments of USTA at 2; Comments of Bell Atlantic at 2; Comments of NYNEX at 2-3.

8/ Although the LECs have addressed the limitations of Basic Exchange Telecommunications Radio Service ("BETRS") and Rural Radio Service allocation for building a wireless local loop, there is a suspicious absence of any discussion in the LEC comments on the availability of PCS spectrum for this purpose. The LECs also fail to address why they could not use unlicensed PCS spectrum to support many, if not all, of their proposed radio spectrum applications.

9/ See Second Report and Order, 8 FCC Rcd 7700, 7751 (1993). All PCS licensees are limited to holding 40 MHz of PCS spectrum in any given geographical service area. See 47 C.F.R. § 20.6(e).

FCC leadership on essential pro-competitive policy initiatives, to offer local loop service.^{10/} Moreover, even SW Bell's comments in the PCS proceedings reflect its previous view that PCS spectrum could be a means for developing a wireless local loop. As SW Bell recognized in its Petition for Reconsideration in the PCS rulemaking, 10 MHz blocks of PCS spectrum will be used for "niche-type applications, such as wireless metropolitan area networks (MANs), wireless local loop service and wireless Centrex/PBX."^{11/} It is, therefore, disingenuous for SW Bell to now suggest that additional spectrum, specifically targeted for the advancement of new services, must be set aside to accommodate the same alleged needs and to accomplish the same end result. Given this record, the Commission cannot consider the possibility of providing LECs with an exclusive wireless local loop spectrum allocation.

10/ See e.g. Comcast Corporation Petition for Reconsideration, Amendment of the Commission's Rules to Establish New Personal Communications Services, GEN Docket No. 90-314 (filed December 8, 1994); Comcast Corporation Reply to Oppositions, Amendment of the Commission's Rules to Establish New Personal Communications Services, GEN Docket No. 90-314 (filed January 13, 1994); Cox Enterprises, Inc. Comments, Regulatory Treatment of Mobile Services, GN Docket No. 93-252 (filed November 8, 1993); Comments of Cox Enterprises, Inc., Competitive Bidding, PP Docket No. 93-253 (filed November 10, 1994); Comments of Comcast Corporation, Equal Access and Interconnection Obligations Pertaining to Commercial Mobile Radio Services, CC Docket No. 94-54 (filed September 12, 1994); Comments of Cox Enterprises, Inc., Equal Access and Interconnection Obligations Pertaining to Commercial Mobile Radio Services, CC Docket No. 94-54 (filed September 12, 1994).

11/ See Southwestern Bell Corporation's Petition for Reconsideration in GEN Docket No. 90-314 at 3, filed December 8, 1993 at 3.

III. Commission Rules Encourage Use of PCS Spectrum For Wireless Local Loop.

The LECs argue that a separate spectrum allocation for "fixed" wireless local loop is necessary. They conveniently ignore, however, the Commission's Rules and clarifications regarding the provision of ancillary fixed services on PCS spectrum. Section 24.3 of the Commission's Rules provides that fixed services may be provided on an ancillary basis to mobile operations.^{12/} Moreover, in clarifying this rule, the Commission has stated that:

examples of permissible fixed services include links connecting PCS base stations and other network operations facilities; transmission of PCS network control and signalling information; and facilities linking users' premises to PCS networks.^{13/}

Accordingly, by permitting PCS spectrum use for the delivery of ancillary fixed service, the Commission has recognized that PCS spectrum may be utilized to establish a wireless local loop. LEC statements to the contrary are flatly wrong.

As early as 1992, with the release of the Commission's Notice of Proposed Rulemaking for the establishment of PCS rules, the utility of LEC participation in PCS using wireless loops was recognized. Specifically, the Commission stated that:

LECs may naturally desire to develop their networks using wireless tails or wireless loops wherever they are more economical than wireline connections. Given that wireline plant may be a substitute for spectrum in the provision of PCS, particularly for backhaul functions and wireless tails, the LECs may be

^{12/} See 47 C.F.R. § 24.3 (1993).

^{13/} See attached Letter to A. Thomas Carroccio, Esq., Santarelli, Smith & Carroccio, from Regina M. Keeney, Chief, Wireless Telecommunications Task Force, Federal Communications Commission, dated November 15, 1994 (emphasis added).

able to achieve competitive unit costs for certain types of PCS even utilizing significantly less spectrum than held by other PCS licensees.^{14/}

The Commission explicitly recognized the opportunities available to local exchange service providers obtaining PCS spectrum in its election not to impose structural separation requirements on LECs and their PCS affiliates.^{15/} While Comcast and Cox both believe that the Commission should have required structural separation in LEC provision of PCS, the Commission's Rules specifically permit and indeed encourage LEC integration of PCS as a wireless local loop.

In adopting its PCS rules and rejecting structural separation, the Commission reasoned that limiting the ability of LECs to take advantage of potential economies of scope through their use of PCS spectrum would eliminate the public interest benefits sought to be achieved through LEC participation.^{16/} The Commission has already considered the needs of the LECs in establishing wireless local loop networks and has supplied PCS spectrum that satisfies their requirements.^{17/}

14/ See Notice of Proposed Rulemaking and Tentative Decision, 7 FCC Rcd 5676, 5705 (1992) (emphasis added).

15/ The Commission also declined to impose added structural safeguards for landline telephone carriers with CMRS affiliates when the issue was presented in the Regulatory Parity rulemaking proceeding. See Second Report and Order, Regulatory Treatment of Mobile Services, 9 FCC Rcd 1411, 1492 (1994).

16/ See Second Report and Order, 8 FCC Rcd 7700, 7751-52 (1993).

17/ Indeed, both Congress and the Commission have taken significant steps to ensure that certain LECs successfully compete for PCS spectrum to encourage their provision of wireless local exchange service. Under both the Omnibus Budget Reconciliation Act of 1993 and the Commission's Rules, rural telephone companies are favored in the bidding process for PCS spectrum to promote wireless delivery of local service in rural areas where infrastructure does not exist. See 47 C.F.R. § 24.709; 47 C.F.R. § 24.714.

No commenter suggests that the LECs cannot compete for and use PCS spectrum for a wireless loop upgrade or overlay to their landline facilities. However, by advocating a new and separate wireless local loop allocation, the LECs seek to insulate themselves from competitive bidding for the reallocated spectrum, or at the very least, to reduce the number of parties that would or could compete for the spectrum at some later wireless local loop auction.^{18/} Having perhaps determined that bidding via auction on PCS spectrum is more costly than suits their convenience, the LECs now request an additional, exclusive allocation, ignoring the efforts the Commission has already undertaken to provide them with the capability to operate wireless local loops within the PCS allocation.

IV. The Public Interest Would Not be Served By a LEC Spectrum Set-Aside.

Setting aside spectrum for exclusive LEC use in the context of allocating new spectrum for advanced services will set back significantly the Commission's efforts to date to promote competition in the local loop. As repeatedly emphasized in the PCS rulemaking and related proceedings, the Commission is well aware of the potential of PCS to encourage competition within all telecommunications markets, including the local exchange.^{19/}

^{18/} In addition to excluding all potential wireline and wireless competitors from use of the spectrum, the LECs also would avoid conflicts with their in-region cellular affiliates who, under present rules, may also compete for a 10 MHz PCS license.

^{19/} See e.g. Fifth Memorandum Opinion and Order, Competitive Bidding, PP Docket No. 93-253, FCC 94-285, at ¶ 2 (adopted November 10, 1994, released November 23, 1994); Further Notice of Proposed Rulemaking, PP Docket No. 93-253, PP Docket No. 93-144, FCC 94-271 at ¶ 2 (adopted October 20, 1994, released November 4, 1994); Fourth Report and Order, Regulatory Parity, GN Docket No. 93-252, FCC 94-270, at ¶¶ 22 & 35 (adopted October 20, 1994, released November 18, 1994); Notice of Proposed Rulemaking, Price
(continued...)

Adopting a set-aside that will provide LEC monopolies with exclusive control over additional valuable spectrum for a service they may already provide using PCS spectrum will serve to further entrench the local exchange carrier as the favored and forever dominant provider of local services.

The harm caused to the competitive development of a telecommunications market in which LECs are afforded a spectrum set-aside is illustrated by the lingering, yet pervasive, effects of the LEC cellular set-aside. Because the Commission provided for a set-aside for one of two cellular licenses available in each cellular market, local exchange competition has failed to emerge from cellular for the simple reason that LECs with cellular affiliates lack the incentive to cultivate cellular into a competitor to their core wired local loop business.^{20/} Similarly, providing the LECs exclusive access to spectrum for the provision of wireless local exchange service excludes the participation of other service providers who have the direct incentive to challenge the local loop monopoly.

When presented with a similar LEC set-aside recommendation in the PCS proceedings, the Commission rejected the LEC set-aside option as contrary to the public interest. Specifically, the Commission determined that a set-aside for the LECs would be

^{19/} (...continued)

Cap Performance Review for Local Exchange Carriers, 9 FCC Rcd 1687, 1690 & 1705 (1994) (indicating that Commission Rules have laid the foundation for competition in local exchange areas).

^{20/} Similarly, given the historical application of the Commission's cellular interconnection policies, LECs have set high "non-discriminatory" interconnection rates for their cellular affiliates and pass those same rates onto the nonwireline cellular operator, making it unlikely, as a matter of economics, that either cellular operator could challenge the LEC monopoly for local service.

"unwise and unwarranted" because it could lead to the development of LEC PCS system and interconnection architectures optimized solely for use of the set-aside spectrum and the Commission would have failed to achieve broader, more flexible service applications.^{21/} Affording any LEC set-aside in other spectrum bands will lead to a similar result, limiting the benefits of wireless local loop technologies to local exchange monopolists and providing no concomitant benefits to the public.

Moreover, the LECs are not the only entities that are interested in developing wireless local loop services. Potential PCS providers, such as Cox and Comcast, continue to view PCS as having the potential to provide an alternative to the LEC for the delivery of local services.^{22/} In addition, new companies have filed comments in this proceeding that anticipate using spectrum to offer local services in competition with LECs.^{23/}

The LECs have failed to articulate, and the FCC cannot articulate a public policy reason to exclude facilities-based entities, such as microwave and cable television providers, from availing themselves of reallocated spectrum for the development of competitive wireless local loops. The Commission should not artificially limit the pool of potential providers of wireless local loop service. The proposed spectrum reallocations present important opportunities for the development and deployment of a broad array of wireless technologies and should not be allocated for the benefit of LECs only, or for the advancement of their specific agenda to avoid PCS auctions.

21/ See Second Report and Order at 7752.

22/ See supra note 11.

23/ See Comments of Avant-Garde at 2-3.

In defining PCS, the Commission deliberately adopted a definition that would allow PCS providers the maximum degree of flexibility to meet the communications requirements of different mobile and portable applications for both businesses and individuals.^{24/} The Commission's definition provides for the operation of the widest possible range of communications, limited only by technological restraints. In reallocating these spectrum bands for a broad array of mobile and fixed services, the Commission must reject proposals that would limit use of the spectrum to particular eligible parties.

The Commission's goals include the development of a regulatory structure that promotes competition in the delivery of all present and future telecommunications services. Any assumption that LECs should have a special or privileged position within this structure would be anachronistic and flawed as a matter of public policy. Accordingly, if, contrary to the lack of demonstrable evidence that such an allocation is necessary or in the public interest, a wireless loop allocation is adopted, the Commission should not limit participation only to the LECs or other state certified carriers.

V. Conclusion

The Commission should reject the LECs' recommendation to establish an exclusive wireless local loop spectrum allocation as unsupported by the record and contrary to the public interest. The advocates of a spectrum set-aside fail to address the ready availability of PCS spectrum for supporting wireless local loop services, and therefore fail to

^{24/} See Second Report and Order at 7712.

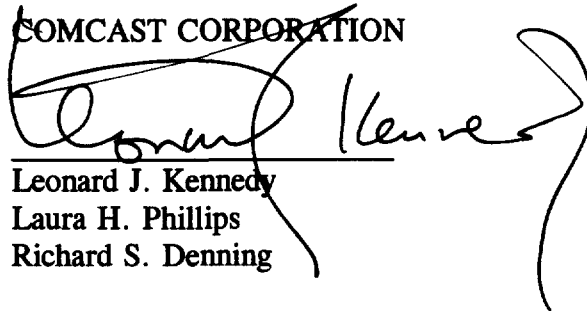
show that the proposed allocation is necessary for the development of LEC wireless local loops.

The proposal also unduly restricts the ability of emerging wireless service providers to compete with local exchange carriers by limiting use of the spectrum to local exchange carriers that already monopolize the delivery of local service. A LEC set-aside will only inhibit the development of competition in the local exchange marketplace. The Commission must reject the notion, in any allocation, that LECs should be afforded any type of special treatment.

Respectfully submitted,

COX ENTERPRISES, INC.

COMCAST CORPORATION



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Federal Communications Commission
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November 15, 1994

A. Thomas Carroccio, Esq.
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Dear Mr. Carroccio:

This is in response to your November 7, 1994, letter asking whether spectrum in the broadband Personal Communications Services ("PCS") may be used to provide fixed communications services. As explained more fully below, although the basic concept of PCS embodies primarily mobile or portable communications, the Commission has delineated circumstances in which PCS licensees also may provide fixed services.

The relevant rule is Section 24.3, 47 CFR § 24.3, which provides in pertinent part:

PCS licensees may provide any mobile communications service on their assigned spectrum. Fixed services may be provided only on an ancillary basis to mobile operations.

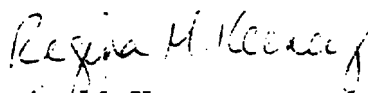
As the Commission stated in adopting Section 24.3, the limited amount of spectrum allocated to PCS is available to meet the primary purpose of serving people on the move, and demand for fixed services generally can be accommodated in other frequency bands or through other media. *See Amendment of the Commission's Rules to Establish New Personal Communications Services*, Second Report and Order, 8 FCC Rcd 7700, 7712-13 (1993).

The Commission, however, also expressly intended the definition of PCS to be sufficiently inclusive to accommodate a wide range of services and technologies, including new and creative applications. *Id.* In this regard, the staff believes that PCS includes fixed services ancillary to or in support of the provision of a wide range of portable and mobile wireless communications services to individuals and businesses. The Commission anticipated that PCS will be provided by a variety of technologies and will be integrated into, and work with, competing networks. The staff believes that examples of permissible fixed services

include links connecting PCS base stations and other network operations facilities; transmission of PCS network control and signalling information; and facilities linking users' premises to PCS networks.

I hope that you find this discussion instructive with respect to the issues raised in your letter. In any event, of course, please contact me if you have further questions.

Sincerely,

A handwritten signature in cursive script, reading "Regina M. Keeney".

Regina M. Keeney
Chief, Wireless Telecommunications Task Force